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COMPANY LAW

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COMPANY LAW

(1) Ownership and control, even if in totality, cannot of itself be a reason to pierce the corporate veil.

(2) The 'interests of justice' cannot be the reason to pierce the veil, even where there is no unconnected third-party interest.

(3) The veil can be pierced only if there is some impropriety.

(4) The corporate veil cannot be pierced just because the company is involved in some impropriety. The impropriety must be linked to the use of the company structure to avoid or conceal liability.

(5) If the court is to pierce the veil it is necessary to show *both* control of the company by the wrongdoer(s) *and* impropriety, that is, misuse of the company by them as a device or façade to conceal their wrongdoing.

(6) A company can be a façade even when it was not originally incorporated with any intent to deceive. The question for the court is whether the company is being used as a façade at the time of the relevant transaction. Also, the fact that the court pierces the veil for one purpose does not mean that it will necessarily be pierced for all purposes.

The most comprehensive recent overview of the topic, however, came with the following decision of the Supreme Court.

KEY CASE

***Prest* v *Petrodel Resources Ltd and others* [2013] UKSC 34 (SC)**

Concerning: lifting the corporate veil

Facts

Following their divorce the wife sought a court order transferring ownership of a number of properties which were owned by two companies. Both of the companies were either wholly owned, or effectively controlled by the husband. The properties had been passed to the companies before the breakdown of the marriage and there was nothing to suggest that this had been done to evade any claim on them that might be made by the wife.

Legal principle

Held: piercing the veil could not be justified in this case by reference to any general principle of law. The properties had been passed to the companies for the purposes of 'wealth protection and the avoidance of tax' rather than to avoid any relevant obligation. However, the properties would be transferred to the wife because the companies had held them under a resulting trust for the husband, who had retained ▶

beneficial ownership. Lord Sumption: 'Where the terms of acquisition and occupation of the matrimonial home are arranged between the husband in his personal capacity and the husband in his capacity as the sole effective agent of the company (or someone else acting at his direction), judges exercising family jurisdiction are entitled to be sceptical about whether the terms of occupation are really what they are said to be, or are simply a sham to conceal the reality of the husband's beneficial ownership.'

✓ Make your answer stand out

Read carefully the sections of the judgment relating to piercing the veil [paras. 16–36] as an excellent background to any examination question on the topic.

Groups of companies

In the same way as a person can own a company and be separate from it by means of the doctrine of corporate personality, so can another company and it is increasingly common for one company (known as a 'holding company') to set up another (known as a 'subsidiary company') to take advantage of the principle of limited liability. A successful company faced with a risky business venture may choose to incorporate a separate company to exploit the opportunity secure in the knowledge that, should it fail, only the assets of the subsidiary company can be used to satisfy its debts, leaving the holding company safe. In this way, it is not uncommon for large groups of companies to be owned by the same 'parent company'.

Despite this legitimate use of corporate personality to reduce risk, the courts have been prepared to ignore the corporate veil and treat the holding and subsidiary companies as one and the same. However, this is only under very particular circumstances and the approach adopted by the courts has been far from consistent.

EXAM TIP

The application of *Salomon* to groups of companies is an important emerging area and examiners will be impressed if you can show a knowledge of the key decisions. However, many students fail to distinguish between the various decisions and this undermines their answers. This is an area where the courts have adopted different views at different times and you need to emphasise this when writing on the topic.

It is possible to trace the development of this area in the following decisions.

KEY CASE

***The Albazero* [1977] AC 774 (HL)**

Concerning: corporate personality and groups of companies

Facts

A shipment of oil belonging to one company was transferred to another company during its voyage from South America to Europe. Both companies were entirely owned by the same 'parent' company. After the transfer of ownership, the ship sank and the cargo was lost. When the first company tried to claim for the loss, the shipowners argued that the second company was the true owner of the oil and it could not claim because the limitation period on such claims had expired. Therefore neither company could claim.

Legal principle

Held: Roskill LJ: 'Each company in a group of companies . . . is a separate legal entity possessed of separate legal rights and liabilities so that the rights of one company in a group cannot be exercised by another company in that group even though the ultimate benefit of the exercise of those rights would [be] to the same person or corporate body.'

However, in other cases, the courts have adopted a more liberal view.

KEY CASE

***Smith, Stone & Knight Ltd* v *Birmingham Corporation* [1939] 4 All ER 116 (KB)**

Concerning: single economic entity

Facts

SSK, a paper manufacturing company, acquired a waste paper business and registered it as a subsidiary company. The parent company held all the shares except five, each of which was held by a director. The profits of the new company were treated as profits of the parent company, which exercised total control over the activities of the subsidiary company. When the local authority exercised its powers of compulsory purchase to take the land occupied by the subsidiary company, the parent company claimed compensation for disruption to its business. However, the council argued that the proper claimant was the subsidiary company, which was a separate legal entity.

Legal principle

Held: that possession by a separate legal entity was not conclusive. As the subsidiary company was not operating on its own behalf but rather on behalf of the parent ▶

company, the parent company was able to claim compensation. Atkinson J: 'The business belonged to the claimants; they were, in my view, the real occupiers of the premises. If either physically or technically the waste company was in occupation, it was for the purposes of the service it was rendering to the claimants.'

KEY CASE

***DHN Food Distributors Ltd* v *Tower Hamlets London Borough Council* [1976] 1 WLR 852 (CA)**

Concerning: single economic entity

Facts

DHN was a parent company, owning two subsidiaries. One of the companies owned a plot of land from which the other company ran a fleet of lorries to deliver goods for DHN. On the compulsory purchase of the land, the question arose as to which company could claim for disruption to its business.

Legal principle

Held: although these were separate companies, they could be regarded as a 'single economic entity'. Denning MR: 'This group is virtually the same as a partnership in which all the three companies are partners. They should not be treated separately so as to be defeated on a technical point.'

The key factors in determining whether the companies were a 'single economic entity' were:

- the degree of control that the parent company exercised over the activities of the subsidiary company (evidenced by the companies having the same board of directors);
- the complete ownership of all of the shares in the subsidiary company by the parent company.

KEY CASE

***Woolfson* v *Strathclyde Regional Council* [1978] 2 EGLR 19 (HL)**

Concerning: single economic entity

Facts

Limited company 'A' carried on a retail business at a shop comprising five premises. Three of the premises were owned by Woolfson and the other two by another limited company, 'B'. Woolfson was the sole director of 'A' and owned 999 shares of the 1,000

issued shares of company 'A', the remaining share being owned by his wife. Woolfson also owned 20 of the 30 issued shares of company 'B', with the other 10 being owned by his wife. All of the shop premises were occupied by a company called M & L Campbell, which sold wedding garments. When the premises were compulsorily acquired by the local authority, both Woolfson and company 'B' jointly sought compensation from the Lands Tribunal, which held that they were not entitled to such compensation.

Legal principle

Held: as the company which carried on the business had no control whatever over the owners of the land, they could not be regarded as a single economic entity and so the rule in *Salomon* would apply. Lord Keith: 'The fact of the matter is that Campbell was the occupier of the land and the owner of the business carried on there. Any direct loss consequent on disturbance would fall upon Campbell, not Woolfson.'

Over time, the liberal approach applied in *DHN* has been less popular.

KEY CASE

***Adams* v *Cape Industries plc* [1990] Ch 433 (CA)**

Concerning: single economic entity

Facts

Cape, an English Company, mined asbestos which it sold through a subsidiary company in the UK and another in the USA. The US company was sued by a number of former employees for injuries arising from exposure to its asbestos but, as the company had disposed of its assets in the USA, only a successful action against the UK parent company would secure damages for the claimants.

Legal principle

Held: the law recognises the creation of subsidiary companies and, even though they are under the control of their parent companies, they will generally be treated as separate legal entities with all the rights and liabilities that would normally attach to separate legal entities. Slade LJ: 'Each corporate member of the Cape group had its own well-defined commercial function designed to serve the overall commercial purpose of mining and marketing asbestos. But that does not constitute a reason why Cape, the parent company, should be treated as present and amenable to be sued in each country in which a subsidiary was present and carrying on business.'

✓ Make your answer stand out

The subsequent case law has demonstrated something of a tension between what might be termed the 'traditional' view of a strict separation between companies and the 'single economic entity' argument. Cite the decisions in *Beckett Investment Management Group Ltd and others* v *Hall and others* [2007] EWCA Civ 613 (CA) and *Ben Hashem* v *Al Shayif* [2009] EWHC 864 (Fam) as evidence of this.

KEY CASE

Chandler v *Cape plc* [2012] 3 All ER 640 (CA)

Concerning: single economic entity

Facts

The claimant was employed by Cape Building Products (CBP), a wholly owned subsidiary of Cape plc. When the claimant later developed asbestosis, he sought to claim against the parent company because CBP had ceased trading. The judge found that the defendant had controlled at least some aspects of CBP's business and that, on the evidence, the defendant had exercised responsibility for protecting employees from harm from the asbestos atmosphere. Therefore, the defendant was liable to the claimant on the basis of an assumption of responsibility. The defendant company appealed.

Legal principle

Held: (in dismissing the appeal) there was no automatic assumption that a parent company would be responsible for a subsidiary company. In such cases, the question was whether the parent company had acted in a manner that created a direct duty to the subsidiary company's employees. Such a duty could exist in relation to the health and safety of its subsidiary's employees where: (i) the business of the parent and subsidiary were in a relevant respect the same; (ii) the parent had, or ought to have had, superior knowledge on some relevant aspect of health and safety in the particular industry; (iii) the subsidiary's system of work was unsafe, as the parent company knew, or ought to have known; and (iv) the parent had known, or ought to have foreseen, that the subsidiary or its employees would rely on its using that superior knowledge for the employee's protection. Arden LJ: 'Given Cape's state of knowledge about the Cowley Works, and its superior knowledge about the nature and management of asbestos risks, I have no doubt that in this case it is appropriate to find that Cape assumed a duty of care . . . to advise Cape Building Products on what steps it had to take.'